STATE OF MICHIGAN

COURT OF APPEALS

BARBARA ANN BASINGER,

Plaintiff-Appellant,

v

SEAN LANCE ADAMS,

Defendant-Appellee.

UNPUBLISHED
December 20, 2011

No. 304417
Ingham Circuit Court
Family Division
LC No. 05-004158-DP

Before: CAVANAGH, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting primary physical custody of the parties' child to defendant. We affirm.

The parties were never married to each other, but paternity of the subject child, born September 11, 2005, is not in question. A judgment of filiation entered in 2006 granted plaintiff primary physical custody of the child, which she maintained until defendant, in January 2011, filed a motion seeking custody. Defendant reported that in June 2010, Child Protective Services (CPS) removed the child from plaintiff's care and placed him in foster care, and that plaintiff's then-boyfriend had been convicted of sex offenses against young children and was currently being investigated on allegations of molesting plaintiff's niece. A conciliator recommended that defendant be granted primary physical custody, reporting that the boyfriend was under a court order dating from December 2010 not to have any contact with the child, and charging plaintiff with willfully disobeying that order and "fail[ing] to protect the child . . . . The conciliator elaborated:

> The minor child . . . was removed from the Plaintiff-mother's custody . . . and placed in foster care in July 2010 . . . after it was learned that the Plaintiff-mother was allowing a convicted sex offender . . . around the child and it was believed that the child was the victim of some type of sexual assault. On January 21, 2011 the Court placed the child in the Defendant-father's care after he had been cleared of all suspicions. . . . [Plaintiff's then-boyfriend] was convicted in 2007 and again in 2010 of sex offenders - failure to comply with reporting duties. He also has a 2004 conviction for misdemeanor stolen property—receiving and

concealing—$200.00 or more but less than $1000.00 as well as a 2009 conviction for misdemeanor domestic violence.

> The Defendant-father also raised a concern about the Plaintiff-mother allowing her brother . . . [to] have contact with the child. [The brother] also has a criminal history that involved a sex crime on a minor. . . .

At the April 2011 hearing on plaintiff's objections to the conciliator's recommendations, the trial court began the proceedings by confirming that the subject child had been placed with defendant since January pending a neglect case, which was under the supervision of the same trial judge. The trial court declared that defendant was "entitled to his hearing on his request to change custody" in light of "abuse/neglect petitions . . . [being] filed and the children . . . [being] placed in foster care," and added that "right now the neglect file trumps all of this." The court took testimony from both parties and also announced its intention to "review the neglect file." Plaintiff's attorney expressly declined to object to the court's recourse to the file in the abuse-neglect proceedings.

At the hearing, defendant admitted that his wife was the subject of a CPS investigation for physical abuse of a child, but insisted that the allegations were false. Defendant also admitted that in 2008, his parenting time was suspended or restricted because he failed some drug tests.

Plaintiff testified that the subject child suffered injuries under defendant's care. According to plaintiff, defendant explained some redness on the child's face as the result of one of his other children striking him with a toy gun, and explained some bruises on the child's arms as the result of defendant having to hold the child down forcibly to get him to take certain prescription medicine.

At the conclusion of the hearing, the court did not issue a ruling from the bench but took the matter under advisement.

On May 18, 2011, the trial court conducted a dispositional review hearing in the abuse-neglect case. A caseworker testified that plaintiff's then-boyfriend "has a serious history of sexual abuse against his sisters who were four and five years old at the time," and added, "The niece has made allegations. Those allegations have been consistent and clear, and the agency believes them to be true." The trial court noted that the child at issue in the instant case was already in defendant's care, and so dismissed the child from the abuse/neglect case. The court further stated:

> The Court determines pursuant to MCL 722.23, that it is in the best interest of David to be in the home of the father. He was able to establish by clear and convincing evidence that there was a proper cause, that being the evidence that has been presented in this . . . neglect case, to have a change of custody. He is in the unique position to provide for the child's material needs and to provide the child guidance, that's under sections b and c, because I find that he's in a superior position to protect the minor child from risk of sexual abuse by [plaintiff's then-boyfriend]. He's doing well in [defendant's] home. . . . [T]he

> child, I don't believe, is old enough to express a preference at this time, at least not a reasonable preference. And I find that the rest of the factors are not particularly applicable to the need for a change of custody.

Regarding plaintiff, the court stated, "I didn't hear anything today that indicates to me that she's benefitting from any of the counseling she's receiving."

That same day, the trial court entered an order in the instant case adopting the conciliator's recommendations in their entirety, and a few days afterward the court entered an order specifically granting defendant sole physical custody of the subject child, while holding plaintiff to supervised parenting time as the parties agreed.

On appeal, plaintiff argues that the trial court failed to recognize that the subject child had an established custodial environment with her, and that the court further erred in consulting both the file from the abuse-neglect case and the conciliator's recommendations and in concluding that the best-interests factors favored defendant. We disagree.

All custody orders must be affirmed on appeal unless the trial court's factual findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994).

Plaintiff argues that the child had an established custodial environment with her that survived the child's removal in connection with the child-protective proceedings. The trial court did not expressly make a finding concerning an established custodial environment, but its invocation of the clear-and-convincing standard of evidence indicates that the court did treat defendant's motion as one seeking a change from the child's established custodial environment. This is because where an established custodial environment exists, custody may not be changed unless there is clear and convincing evidence that a change is in the child's best interests, *Ireland v Smith*, 451 Mich 457, 461 n 3; 547 NW2d 686 (1996), citing MCL 722.27(1)(c), but where there is no established custodial environment a court may award custody on the basis of a preponderance of the evidence, *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981). The court's use of the higher evidentiary standard thus obviates any concerns over whether the child had retained his established custodial environment with plaintiff.

Concerning the court's use of the file from the child-protective proceedings, when the court asked plaintiff's attorney if he had any objections to its doing so, counsel replied, "usually there's good and bad in there, your Honor, . . . but no, I don't." Counsel thus affirmatively waived objections for purposes of appeal, extinguishing that issue. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

Moreover, the court did not err in consulting the conciliator's recommendations. Not only was there no objection below to the court's doing so, plaintiff in fact filed objections to those recommendations, and the hearing on those objections was a full evidentiary proceeding. If plaintiff was not satisfied with the evidentiary basis for anything in the conciliator's recommendations, she had every opportunity to offer her own evidence and otherwise contest what the conciliator had to say.

Concerning the statutory best-interest factors set forth in MCL 722.23, the trial court cited factors (b) ("[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any") and (c) ("[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs") in declaring defendant to have the advantage in providing the child with guidance and material needs, including by way of better protecting the child from potential sexual abuse by plaintiff's then-boyfriend. The court also touched on factor (i) ([t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference") by way of stating that the child was too young to have a reasonable preference, and it declared the remaining factors "not particularly applicable to the need for a change of custody. Plaintiff expressed no concerns below at the court's having summarily disposed of factors (a), (d), (e), (f), (g), (h), (j), and (k), and does so on appeal only by implication in her statement of the question presented, offering no such argument in the argument section of her brief on appeal. Such lack of cogent argument abandons an issue for purposes of appellate review. See *People v Jones* (*On Rehearing*), 201 Mich App 449, 456-457; 506 NW2d 542 (1993) (insufficient argument and insufficient reference to the record), *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992) ("[a] party may not merely announce his position and leave it to us to discover and rationalize the basis for his claim"), and MCR 7.212(C)(7). However, plaintiff does argue that the court's findings in connection with factors (b) and (c) were against the great weight of the evidence.

Concerning the child's material needs under factor (c), plaintiff describes the parties' respective residences and points out that neither has an obvious advantage in that regard. Plaintiff acknowledges evidence of defendant's and his wife's respective employment situations, including that their working hours were arranged so that they could care for their children, including the subject child, at home. Plaintiff concedes that there was no evidence of employment on her part, but entreats this Court to entertain "a reasonable inference . . . that she could provide for material needs because she had been doing so for the entire five years of the child's life." We conclude that the trial court's affording the specific evidence of defendant's and his wife's employment, and ability to be at home with the children, greater weight than any mere inference that plaintiff could satisfy the child's material needs comported with the great-weight-of-the-evidence standard.

Concerning affection and guidance under factor (b), plaintiff's history of exposing the child to a sex offender who made victims of young children, in contrast with there being no evidence of such a hazard in defendant's care, provided the trial court with a solid evidentiary basis for weighing that factor in defendant's favor. Plaintiff protests that there is no evidence that her boyfriend, even with a history of abusing children, posed a threat to or ever harmed the subject child. However, we are not persuaded that a known child abuser poses no danger to a given child only because he has not yet attacked him. Plaintiff additionally protests that the trial court ignored evidence of physical injuries the subject child suffered under defendant's care. We find that the trial court did not err in tacitly being unconcerned about bruising resulting from a skirmish with another child, or from defendant's having had to hold the child down for medical purposes. Plaintiff also argues that defendant's wife had been the subject of a CPS investigation. However, so had plaintiff herself, as discussed above. Plaintiff lastly argues that the child had not been "doing well" in defendant's home because he was going to have to repeat a grade of

school. However, a caseworker testified at the May hearing that the child was in fact "doing well" in defendant's care, that his "speech ha[d] improved," and that "[h]is behaviors seem to escalate following parenting times with his mother, but are otherwise pretty consistently good." We find no basis for reversal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Patrick M. Meter